

ADMINISTRATIVE PANEL DECISION

LEADR Case No: auDRP_10_14

Domain Name: **goodmanfielderbaking.com.au**
Name of Complainants: **1. Goodman Fielder Limited**
2. GF Brand Holding Company Pty
3. Quality Bakers Australia Pty Ltd
Name of Respondent: **Andrew Goddard**
Provider: **LEADR**
Panellist: **John A. McGruther**
Date: **28 July 2010**

1. THE PARTIES

1.1 The Complainants are Goodman Fielder Limited, GF Brand Holding Company Pty Ltd and Quality Bakers Australia Pty Ltd (jointly described herein as “Complainant” – “G”) and respectively as above as Complainants 1, 2 and 3.

1.2 The Respondent is Andrew Goddard (“Respondent” – “A”).

2. THE DOMAIN NAME REGISTRAR AND PROVIDER

2.1 The Domain Name at issue is **goodmanfielderbaking.com.au** (‘the Disputed Domain Name’).

2.2 The Trade Marks, names or service marks upon which the Complaint as submitted and dated 16 June 2010 (“Complaint”) is based are:

- Name: GOODMAN FIELDER
- NSW registered business name BN98127045 GOODMAN FIELDER BAKING
- Northern Territory registered business name BN00831256 GOODMAN FIELDER BAKING
- Registered company name GOODMAN FIELDER LIMITED (ACN 116 399 430)

- Australian Trademark Registration No 846628 GOODMAN FIELDER
- Australian Trademark Registration No 1141417 GOODMAN FIELDER TOTAL BAKER SOLUTION
- Australian Trademark Registration No 1246989 GOODMAN FIELDER Logo.

2.3 The provider in relation to this proceeding is LEADR ('Provider').

3. PRELIMINARY MATTERS

- 3.1 Schedule A of the *au Dispute Resolution Policy* ("auDRP") ("Policy") applies to disputes which meet the requirements set out in Paragraph 4a of Schedule A of the auDRP. This subparagraph 4a requires that any party holding a domain name licence
- "...submit to a mandatory administrative proceeding in the event that a third party (a "complainant") asserts to the applicable Provider, in compliance with the Rules of Procedure that:*
- (i) [their] domain name is identical or confusingly similar to a name, trade mark or service mark in which the complainant has rights; and*
 - (ii) [they] have no rights or legitimate interests in respect of the domain name; and*
 - (iii) [their] domain name has been registered or subsequently used in bad faith.*

In an administrative proceeding, the complainant bears the onus of proof."

4. PROCEDURAL HISTORY

- 4.1 The procedural history in this matter is set out in Annexure 'A' to this determination.
- 4.2 LEADR has appointed this Panellist as the sole Panellist ("Panel") in the matter. The Panellist has had no prior knowledge of or association with either party and has no conflict of interest. The Panel received the Complaint delegation from the Provider on 20 July 2010.

- 4.3 All procedural requirements appear to have been satisfied. The Panel has been properly constituted. So far as the Panel is aware all pertinent written communications by the parties to or with the Provider have been concurrently copied to the other party.
- 4.4 The Panel is satisfied that the Respondent has been served with and/or is on full notice of this Complaint. A copy of it was sent by email to the Respondent's email (various) addresses (paragraph 39 of the Complaint). Further, the Procedural History Annexure "A" affirms that the Provider sent to the Respondent both by letter and by email on 23 June 2010 a notification letter and copy of the Complaint (paragraphs 3 and 4, Annexure "A"). Further, Annexure "A" refers to the Provider's further telephonic attempts on 6 July 2010 unsuccessfully to contact the Respondent or to receive response or contact from the Respondent (paragraphs 8 and 10 Annexure "A").
- 4.5 Certain written material has been submitted to the Panel as provided by the Complainant to the Provider. The Respondent has not submitted any written material to the Complaint, such opportunity having been provided. The Respondent has not responded, as set out in the Procedural History Annexure "A". The observations in this determination arise singularly from the material submitted. I have read all of the materials. There is no need that I traverse all of it in the reasons here given, but all of it has been noted and analysed.
- 4.6 Paragraph 15(a) of the auDRP Rules states:
"A Panel shall decide a complaint on the basis of the statements and documents submitted and in accordance with the Policy [the auDRP Policy], these Rules and any rules and principles of law that it deems applicable".
- 4.7 The Policy applies to the Disputed Domain Name.

5. FACTUAL BACKGROUND: The Complainant's (G's) case

5.1 In submissions made with its Complaint, the Complainant (“G”) essentially raised some of the following matters (including as set out within Annexures “A” to “G” of those submissions) namely that:

- (a) Each of the corporations making up the Complainant is an Australian Company. Together, they are part of the same group of companies, Complainants 2 and 3 being wholly owned subsidiaries of Complainant 1.
- (b) That the Respondent, Andrew Goddard, is a natural person. Paragraphs 6-7 and Annexures “A” and “B” of the submissions so refer (note that hereafter, references to paragraph numbering or to Annexures are to such paragraphs and Annexures of the Complainant submissions). Annexures “A” and “B” verify database “Whois” search showing no Respondent contact details other than the two (2) email references described, and the website search of “goodmanfielderbaking.com.au” as not revealing any additional Respondent contact details.
- (c) That there are a large number of other subsidiaries sharing the GOODMAN FIELDER name (listed at paragraph 12). The Panel here notes that the Goodman Fielder Ltd Annual Report 08/09 (Annexure “D”) (over 120 pages all closely studied by the Panel) contains the following references, not exclusively, but illustratively only, namely:
 - (i) Detailed references to “*GF Fresh Baking Division*” Australasian operations and products (page 12).
 - (ii) Reference to “*Brands that are trusted by families everywhere...*” (page 17 onwards).
 - (iii) Detailed Financial Statements including references to the various trading divisions and operations within the Group, including pertinently here with reference to “*baking*” and related activities.
 - (iv) Pictorial and other illustrations and references to the Group range of products including particularly with reference to bread, bakery and related products and operations.

- (d) As at the date of this Complaint, the domain name used by the Complainants G is “goodmanfielder.com.au” created on 18 May 1997 and registered on 11 March 2008 (Annexure “G”).
- (e) That Goodman Fielder Ltd is a leading listed Australasian food company with a vast portfolio of well known consumer brands across a breadth of grocery categories including bread (paragraph 13, amongst other references).
- (f) That the GOODMAN FIELDER name is well known by consumers and within the industry as associated with long-standing manufacturing, retail and distribution operations throughout Australasia and elsewhere.
- (g) That Complainant 1 manufactures products in almost sixty (60) plants in Australia and the Pacific region including on a large-scale network distribution basis, not exclusively involving over thirty thousand (30,000) retail and other customer outlets.
- (h) That the name GOODMAN FIELDER was first used in 1986 with that name being used extensively within the Group and in the market including as above described (paragraph 15).
- (i) GF Brand Holding Company Pty Ltd (Complainant 2) is the registrant of the Domain Name “goodmanfielder.com.au”. This is verified in Annexure “E”, including there by reference to Trademark Owner.
- (j) That the GOODMAN FIELDER name is used extensively throughout the “goodmanfielder.com.au” website. This is verified within Annexure “F”. The Panel additionally here notes that Annexure “F” incorporates extensive product and brand references, trademarks, logos and designations

including (not exclusively) those relative to bread, baking, flour and related products and derivatives.

- (k) That various other domains containing the GOODMAN FIELDER name have been registered by various subsidiaries within the Group. Some such domains are referred to at paragraph 19 and in Annexure “G”, all of which include the predominant identifying descriptive “goodmanfielder”, including there references to “nz” and “uk”.

- (l) Since around 1986, G has carried on business actively in Australasia and the Pacific Islands, including but not exclusively trading under or with the trade name “ Goodman Fielder” and under or with the Trade Marks “ Goodman Fielder” and “Goodman Fielder Total Bakery Solution”. “Goodman Fielder” was registered with the Australian Trademarks Registry as a Trade Mark from 2 September 1997 in classes 1, 5, 29, 30, 32 and 40 under Trade Mark No 846628 (which includes baking, bakery, bread and related trademark categories) and owned by Complainant 2. The “Goodman Fielder” (Logo) was registered under No 1246989 with the Australian Trademarks Registry as a Trade Mark from 18 June 2008 in classes 29, 30, 32 and 43 (and in similar therefore trademark categories as above), and owned by Complainant 2. “Goodman Fielder Total Bakery Solution” was registered with the Australian Trademarks Registry under No 1141417 from 18 October 2006 in class 30, also owned by Complainant 2. This, and other, content and history is reflected within Annexure “H”.

- (m) Complainant 3 is Quality Bakers Australia Pty Ltd, also a subsidiary within the Group. It has bakeries throughout Australia and New Zealand. Amongst its trading designations is that it trades under the business name “GOODMAN FIELDER BAKING” in the Northern Territory and New South Wales under business names respectively there registered since 30 May 2000 and 16 March 2005 (Annexure “I”).

- (n) That the Respondent A registered the Disputed Domain Name “goodmanfielderbaking.com.au” (last modified on 22 April 2010 per annexure “A” to the Complaint) and carried on business directly in competition with that business of the Complainant detailed above.
- (o) That by 17 May 2010, G had become aware of the existence of the Disputed Domain Name.
- (p) That the Registrar for the Disputed Domain Name is “NetRegistry”.
- (q) Arising from the above and generally, G submits its Complaint Grounds (briefly recited) include that the Disputed Domain Name:
 - (i) Is identical or confusingly similar to a name, Trade Mark or service mark in which G has rights.
 - (ii) Is not a domain name in which the Respondent has any rights or legitimate interests.
 - (iii) That the Respondent has registered or subsequently used it in bad faith.
- (r) Arising from these submissions, G submits for the remedies set out within the Complaint.
- (s) Annexure “J” of the Complaint (being an email dated 17 May 2010 from G to A) sets out the demands and claims (with reasons) of the Complainant including for the cessation by A of the Disputed Domain Name use, amongst other claims, rights and demands, substantially arising from some of the factual background here recited. The Panel has noted the full content of this Annexure “J” email in the full context of this matter also.

6. FACTUAL BACKGROUND

The Respondent’s (A’s) case

6.1 The Respondent A made no submissions in response to the Complaint. Thus, the Panel has no assistance or any written material at all, submissions or otherwise, from the Respondent.

7. DISCUSSION AND FINDINGS

Elements of a successful complaint

7.1 According to Paragraph 4a of the .auDRP Policy, a person is entitled to complain about the registration or use of a domain name where it is intended that:

- (i) The domain name is identical or confusingly similar to a name, trade mark or service mark in which the complainant has rights; and*
- (ii) The respondent to the complaint has no rights or legitimate interests in respect of the domain name; and*
- (iii) The respondent's domain name has been registered or subsequently used in bad faith.*

7.2 It is to be noted that the three elements of a complaint under Paragraph 4a of the auDRP Policy are cumulative; all of them must be proved if the Complaint is to be upheld.

Is the Disputed Domain name identical or confusingly similar to a name, Trade Mark or service mark in which the Complainant has rights? (auDRP 4a(i))

7.3 The Panel must determine whether the Complainant has rights in a relevant name, Trade Mark or service mark.

7.4 The auDRP Policy states:

For the purposes of this policy, auDA has determined that a "name...in which the complainant has rights" refers to

- (a) The complainant's company, business or other legal or trading name, as registered with the relevant Australian government authority;*

(b) *The complainant's personal name.*"

7.5 The auDRP Policy does not provide guidance as to the intended meaning of "*identical*" or "*confusingly similar*". However, "*essential or virtual identity*" is sufficient. (*BlueChip Info Tech Pty Limited v Roslyn Jan and another* [LEADR case 06/03]).

7.6 Although it may appear that there is no exactitude as to what is contemplated in the term "*confusing*", the test of "*confusing similarity*" could have reliable precedent in the trade mark infringement case application of the expression, where the concept of "*deception*" contemplates consumers who may be deceived or "*caused to wonder*" about the source or origin of goods or services. (as, for example, noted in *Camper Trailers WA Pty Ltd v Off Road Equipment Pty Ltd* [LEADR 06/04]).

7.7 The Panel makes the following observations in no priority order:

(a) That the Complainant argues that it has acquired a substantial reputation in Australia and overseas in relation to its extensive marketing, use and promotional activities in relation to the names GOODMAN FIELDER, GOODMAN FIELDER BAKING, and from all of the trademarks and intellectual property usages under those and related Group names including as previously here referred to. The Panel believes that there is a sustainable basis to this Complainant argument.

(b) The Complainant argues that the manufacturing and retail industries, and the media and customer public in Australia and elsewhere, readily associate GOODMAN FIELDER and GOODMAN FIELDER BAKING with the Complainant and its Group operations. The Panel accepts that there is a sustainable basis for this argument.

(c) G has had the online presences described above including fully functioning websites using the Domain Name "goodmanfielder.com.au" and accruing not insignificant

reputational business and consequential goodwill value in part generated from such presence and identity.

- (d) Additionally, G subsequently supplemented that active presence by initiating the successful Trade Mark Registrations, Business Name Registrations, and other designations and trading identities as earlier referred to.

- 7.8 Broadly, the submitted chronology on the material before the Panel (and which is not disputed within any of the written material inherited by the Panel) is accepted substantively as to evidence an active commercial use and exposure by G of its “Goodman Fielder” name, corporate name, online presence, and Trade Mark associations, all of which are referred to in earlier chronology and background recitation. Further, there is no argument or dispute before the Panel as to the integrity or accuracy of that background. Indeed, the Respondent has made no response at all to the Complaint.
- 7.9 A has registered the Disputed Domain Name. No argument or dispute is put before the Panel as to there being any relevant doubt about or contention upon the similarity of the Disputed Domain Name to the trade name, operating and business names and Trade Marks, the online presence and other designations of G. No relevant dispute is put before the Panel here contesting as to that similarity. The Respondent has in fact made no response to the Complaint.
- 7.10 Many of various Annexures to the Complainant G’s submissions attest to the corporate, trade, commercial, Trade Mark, business name, online presence and other representations of its business and conducted as an active and continuing business under and by reference to the primary title “Goodman Fielder” (central words or feature). None of that is largely contested here.
- 7.11 Further, no dispute, argument or indeed any submission is put by the Respondent A contesting as to the Complainant G having rights in or to all of those “Goodman Fielder” designations other than for

the issue emerging in this referral as to the Disputed Domain Name itself.

- 7.12 Nor is there any relevant dispute, by reference to the entitlements of G to its business and ongoing trade usage of “Goodman Fielder” (other than for the Disputed Domain Name issue here) under and by reference to the designations under which, on a continuing and active basis, “Goodman Fielder” already operates and as referred to briefly earlier.
- 7.13 There is no dispute evident on the papers before the Panel that G does not have a relevant reputation residing in its various “Goodman Fielder” designations (previously referred to, again other than for the discrete Disputed Domain Name issue before this referral). As stated, there are no submissions from the Respondent to the Complaint.
- 7.14 The onus of establishing the Complaint under this heading rests with G. That onus does not extend to a Complainant needing to establish any consumer association of words (say, here, “Goodman Fielder”) singularly with the Complainant’s business or reputation. Any name or term used (and whether ‘generic’ or otherwise) which ‘primarily’ has an association with a Complainant’s business is enough, prima facie, to give rise to confusing similarity under this heading.
- 7.15 There is no relevant evidence before the Panel upon which it could safely conclude that the Complainant has not established the relevant onus here.
- 7.16 The Panel makes the following further observations in no priority order.
- 7.17 On 17 May 2010, General Counsel for G (Mr West) sent an email letter of demand to the Respondent which included the following contentions, demands and content (not exclusively):
- (a) That in registering the Disputed Domain Name, the Respondent fraudulently represented in the application

process authorisation to be acting on behalf of the Complainant (such not being so).

- (b) That A had attempted to set up a “virtual telephone message centre” citing Complainant 1’s Australian Business Number (“ABN”) in that purported application.
- (c) That the Complainant viewed such actions as amounting to:
 - (i) Deliberate unauthorised use of the Complainant’s Trade Mark and trading name (baking division in particular).
 - (ii) Misleading and deceptive conduct and gross misrepresentation in breach of the Trade Practices Act (Federal) and of the Fair Trading Act (NSW); and,
 - (iii) Obtaining a benefit by deception (contended Crimes Act (NSW) contravention).
 - (iv) Demanding (amongst other) cessation of such representations, cessation of use of the Disputed Domain Name and (in effect) cessation of any utility whatsoever of that Disputed Domain Name or of any other associated sites linked to it, and an immediate transfer of registration of the Disputed Domain Name to the Complainant (Annexure “J”).
- (d) In response to the Annexure “J” demand (described above), the Complainant (in effect) received two (2) confirmatory emails from the Respondent respectively of 17 May and 18 May 2010 (Annexure “K”) containing (in effect) unqualified written confirmation that the Respondent would *“comply... by the end of the week... I comply with all your requests – take this email as confirmation..”*.

7.18 Broadly, the Panel is satisfied, including on that requisite onus, that there is a position of conviction to the G Complaint, under this heading, and in any event by reference to the undisputed account of matters on the papers before the Panel, that the Disputed

Domain Name is identical with or confusingly similar to a name, Trade Mark or service mark in which G as Complainant has rights.

- 7.19 In particular, the Panel regards it as especially noteworthy, and as submissions of strong conviction from the Complainant, that the Disputed Domain Name clearly incorporates the Trade Marks and names GOODMAN FIELDER and GOODMAN FIELDER BAKING, particularly in the light of the fact that the predominant title within the Disputed Domain Name is comprised of the title or designation “goodmanfielder” and of the description “baking”. Here, the Panel is comfortably satisfied that there cannot be anything other than confusing similarity so arising. The Panel is satisfied that such registration and use by A of the Disputed Domain Name has the real likelihood of resultant consumer confusion.
- 7.20 The Panel accepts the integrity of the Complainant’s arguments, against all of the pertinent background, that the designations GOODMAN FIELDER and GOODMAN FIELDER BAKING, are names well known within the industry in which G operates and equally well known to its product consumers as to enhance the prospect and real likelihood of identity confusion.
- 7.21 The Panel further accepts the integrity of the Complainant’s argument that the Disputed Domain Name and website will have a ready association and recognition in the mind and actions of consumers as being brands and corporate identifications associated with the Complainant and its Group.
- 7.22 For these reasons, on the balance of material before the Panel, there is in its determination, the real potential for, and the actuality of, identity confusion in the terms which meet the foundation for the Complaint of G under this heading and where G, in the determination of the Panel, has established the requisite onus.
- 7.23 Accordingly, the Panel determines that the Complainant has satisfied the requirement of “*identical or confusingly similar*” in Paragraph 4a(i) of the auDRP Policy.

Does the Respondent have any rights or legitimate interests in respect of the Disputed Domain Name? (auDRP 4a(ii) and 4c(i)-(iii))

7.24 This is the second element for establishment within a Complaint under the auDRP. It involves deliberation upon the issue as to, whether or not, a Respondent has, in the circumstances of the particular presentation, no rights or legitimate interests in the Disputed Domain Name (as contended by G here). This is relative to considerations pursuant to Paragraph 4a(ii) of auDRP Policy and to 4c(i)-iii) of the Policy.

7.25 Firstly, it is imperative to note, including here, that ‘rights or legitimate interests in respect of the Disputed Domain Name’ are not established merely by a Registrar’s determination that the Respondent satisfied any relevant registration criteria for the Disputed Domain Name at the time of its Respondent registration (and refer Note 2 of the Policy). There is accordingly no basis for any Respondent argument (had there been any) singularly put by reference to registration, or necessarily, as to later use since registration, on that basis. In any event, the Respondent has made no submission on this or on any other basis to this Complaint.

7.26 The relevant burden of proof is to the extent that the Complainant need only make out a prima facie case that the Respondent has no legitimate interest, whereupon that burden then shifts to the Respondent to produce evidence of any relevant interest in the name in issue, as to satisfy the Panel (*Document Technologies, Inc v International Elec Communications Inc* (WIPO Case D2000-0270) (June 6, 2000).

7.27 The auDRP does not attempt to define forensically what is meant by a right or legitimate interest in a Domain Name. Paragraph 4c of auDRP lists three (3) (and importantly, non-exclusive) examples of what may comprise any contended ‘right or legitimate interest’, namely (briefly stated):

- (i) Use, or demonstrable preparations to use, the Domain Name in connection with a bona fide offering of goods or services; or

- (ii) The Respondent being commonly known by that Domain Name; or,
- (iii) Making a legitimate non-commercial or fair use of the Domain Name, without intent for commercial gain to misleadingly divert consumers.

7.28 It is not necessary for the Panel to traverse in fullness the written material pertinent to this heading. The following observations are made on the material before the Panel, and in no priority order.

7.29 The Panel notes the following and in no priority order:

- (a) The Panel accepts on the written material before it that the Complainant has never granted the Respondent A any right or authority to use or register any of the GOODMAN FIELDER or GOODMAN FIELDER BAKING names or Marks, either in connection with any domain name registration (whether for the Disputed Domain Name or any other) or to be associated with any offering of goods or services by A on behalf of the Complainant or for holding out for any commercial activities for or on behalf of the Complainant (including by reference to any diversion of trade, commerce, payment or accounting to A as if representing the Complainant G in any capacity).
- (b) The Panel accepts that the Complainant has no association or any relationship with the Respondent.
- (c) The Panel accepts that the Respondent A has been put on notice by G that the Respondent's use of the Disputed Domain Name has no authority, express or implied, from the Complainant.
- (d) The Panel accepts that the activity of the Respondent in initiating the registration of the Disputed Domain Name (and some other associated activity) is misleading and deceptive and is likely to cause confusion to the industry and consumer public, and that the cessation by A of such activity,

notwithstanding notice and demand to the Respondent to do so, has been resisted by the Respondent and not ceased.

7.30 The Panel is thus satisfied that the Complainant G has satisfied the relevant burden of proof to the extent of making out its Complaint under this heading. The Panel is equally satisfied that the Respondent A has not discharged the burden, then shifting to it, to produce any evidence of any relevant interest in the Disputed Domain Name.

7.31 The Panel additionally notes the following and in no priority order:

- (a) G submits that, at the time when A registered the Disputed Domain Name, A had an active awareness of G due to the prominence of G's presence in the market. Further, the Panel reasonably concludes as to the high probability of A having such market knowledge of the prior presence of G, including under "Goodman Fielder" (variously described) from either conducting pre-registration search and inquiry, or having otherwise a sharp awareness of the presence of G in the market, and in likelihood prior to the registration initiative taken by A to register the Disputed Domain Name.
- (b) It is noted that A appears to have no business name, Trade Mark or service mark that is similar to or suggestive of the Disputed Domain Name (other than for having chosen its registration). Whereas comparatively, the G domain name "goodmanfielder.com.au" has been actively designed (and with an active online presence as earlier described) to inform and to direct consumers and enquirers of and to the trading name and operations of G.
- (c) To reiterate, for the purposes of Policy interpretation, auDA has determined that rights or legitimate interests in respect of the domain name are not established merely by a Registrar's determination that a respondent satisfied the relevant criteria for the domain name at the time of registration. Thus, the fact of Registrar Domain Name Registration does not defeat the

validity of a Complaint made under this or any other auDA heading.

- 7.32 The Panel observes that the potential for confusion as to the source of the Disputed Domain Name is a relevant and appropriate consideration in analysis of any claim for legitimacy of interest under this heading.
- 7.33 The Panel has already indicated the principles as to the relative evidentiary burdens, but here immediately notes, and determines, that G as Complainant has made out a prima facie case that A, as registrant of the Disputed Domain Name, has no legitimate interest in it (including as arising from observations which further follow). It is for A then, to satisfy the Panel, the onus resting upon A, that it has a relevant interest in that Name. The Panel is comfortably satisfied that A has not discharged that onus.
- 7.34 As already stated, the mere fact of Disputed Domain Name registration by A as Respondent does not connote a legitimacy of interest or right in it.
- 7.35 Further, an offering of goods or services (had A offered any) is not bona fide if use of the Disputed Domain Name is likely to cause consumer confusion including, such as and by one illustration only, that it may infringe a Complainant's trade name rights or acquired reputation (*Universal City Studios Inc v GAB Enterprises* (WIPO Case D2000-0416)).
- 7.36 Here, several matters are noteworthy. Firstly, including in terms of paragraph 4c(i) of auDRP, it is apparent on the material before the Panel that A has not used the Disputed Domain Name in any real connection with a bona fide offering of goods or services. If anything, the use by A of the Disputed Domain Name has, respectfully, been in the limited context of such matters as diverting email traffic or inquiry away from G. In terms of the illustrated example within paragraph 4c(i) of auDRP this does not amount to a qualifying 'bona fide' use of the Disputed Domain Name.

7.37 The Respondent A, further, is not commonly known by any reference, actively or otherwise, to the Disputed Domain Name, including by reference to paragraph 4c(ii) of auDRP.

7.38 Further, there is no reliable evidence before this referral that any use by the Respondent A of the Disputed Domain Name is a legitimate non-commercial or fair use of it. Further, specifically, that use thus far by the Respondent A, on the material before the Panel, is illustrative of such usage being retained for purposes of a contended registration ownership only, and that any use has substantively been for ultimate diversionary purposes.

7.39 In all of these respects, and generally, and again it is entirely undisputed here, it would reliably appear that A is, and has at all relevant times been, aware or reasonably aware of the reputational interest maintained by G in the Disputed Domain Name, including as part of its “Goodman Fielder” overall corporate, trade name and Trade Mark designations equivalently.

7.40 None of the above is illustrative, in the view and determination of the Panel, of the Respondent A maintaining a foundation for rights or legitimate interests in the Disputed Domain Name, or to be acting reasonably or bona fide in adhering to a position of maintaining to itself such registration.

7.41 For these reasons, accordingly, the Panel is not of the view that A has discharged the onus as to establishing, in the circumstances of this presentation, a right or legitimate interest in respect of the Disputed Domain Name in issue here.

7.42 Accordingly, the Panel finds that the Respondent A has no right or legitimate interest in the Disputed Domain Name. Paragraph 4a(ii) of the auDRP Policy has been satisfied by the Complainant.

8. Has the Disputed Domain Name been registered or subsequently used in bad faith? (paragraphs 4a(iii) and 4b of auDRP Policy)

8.1 The Panel has noted and studied the full context and content of all requisite material under this heading.

8.2 Paragraph 4b of the auDRP Policy sets out circumstances of “*evidence of the registration and use of a domain name in bad faith*”. This Paragraph contains four sets of circumstances, any one of which, if established, can constitute evidence of registration in bad faith. It is important to note also that it is a non-exhaustive list of circumstances such that, for example, the Panel is not necessarily constrained from a finding of bad faith should it arise (also by example) from not only any one or other of them, but from a combination of them, or indeed, upon the basis of other reliable material before the Panel inclusive of the illustrated list. In other words, the circumstances illustrated in paragraph 4b are not an exclusive or limited listing.

8.3 The essence of each of the subparagraph illustrations in Paragraph 4b of the Policy as non-exclusive examples of evidence of bad faith are (briefly stated):

- (i) Circumstances indicating that the subject registration is primarily for the purpose of selling, renting or otherwise transferring it including for valuable consideration in excess of documented out-of-pocket costs directly related to it; or,
- (ii) A registration to prevent the owner of a name, trademark or service mark from reflecting those same names or marks in a corresponding domain name; or,
- (iii) Registration primarily to disrupt business; or,
- (iv) Use of the domain name as to intentionally attempt to attract, for commercial gain, Internet users to a website by creating a likelihood of confusion.

8.4 As indicated, these are non-exclusive illustrations. Also, as previously stated, the establishment of any one of them can be enough as to a finding of relevant bad faith. Other factors may also demonstrate bad faith.

- 8.5 Relevantly, in the view of the Panel, the Complainant G submits under this heading (and in no priority order) some of the following:
- (a) Reiterates much of its earlier submissions content under the two (2) previous primary headings.
 - (b) Submits that the Disputed Domain Name is so similar to G's domain name, company name and registered Trade Mark (as discussed also above) as to create confusing similarity in particular to the customers or enquirers of G.
 - (c) A choosing to initiate a registration of the Disputed Domain Name, connotes bad faith.
 - (d) That paragraphs 4(b)(ii), (iii) and (iv) of the Policy apply to this Complaint including the likelihood of consumers mistakenly associating the Disputed Domain Name with the Complainants' activities and products. Respectfully, the Panel concurs.
 - (e) That, in the name GOODMAN FIELDER being the most prominent element of the Disputed Domain Name designation, such is likely to disrupt the business activities of G including by diversion of consumers to A's website. Respectfully, the Panel concurs.
- 8.6 The Panel, on the written material before it, notes some of the Respondent A's behaviours as including the act of Disputed Domain Name Registration, and some other diversionary account payment and other activity. These behaviours of A have been against the background of the established strong reputation of G in its names and trademarks in Australia and beyond.
- 8.7 The Respondent A appears to deliberately have so selected and initiated such registration process and other activities.
- 8.8 It appears reliably to the Panel that A has deliberately chosen the use (unauthorised) of the Business Name GOODMAN FIELDER BAKING (NSW BN 98127045) to convince the Registrar of a

purported eligibility of A to so register the Disputed Domain Name when it is clear that such Business Name was not owned by A but by Complainant 3, and without permit, warrant or authority given to A to do so or to so hold out (refer Annexures “A” and “F”, amongst other).

- 8.9 That it appears that the Respondent A has attempted to set up a virtual telephone message centre in the names of GOODMAN FIELDER BAKING and of Complainant 1, citing the ABN number of Complainant 1 in such application attempt (Annexure “L”), without permission or authority to so represent, apply, or hold out.
- 8.10 On the written material before the Panel, and to which there has been no response from A, it appears that the Respondent has attempted to make or made contact with some of the Complainants’ contractor agencies by telephone by reference to setting up a title “A J Newson” as a nominal but fictitious contractor under the purported supervision or engagement of A, with the resultant processing of payments to such nonexistent “contractor” and that such behaviour has resulted in an apparent approximate payments being diverted to A totalling about \$10,000 (refer Annexure “M”), resultant in a police report being made by the Complainant.
- 8.11 The written material illustrates that the Respondent has provided a confirmatory reply to the letter of demand of the Complainant (Annexures “J and “K”) affirming then an agreement by A to immediately cease use of the Disputed Domain Name and to voluntarily transfer it to the Complainant, but that A has not so acted on this additional representation and promise.
- 8.12 Individually and collectively, it is the view and determination of the Panel, that such Respondent behaviours contravene this bad faith heading of auDRP Policy (*Telstra Corporation v Nuclear Mushrooms* – WIPO-D2000-0003).
- 8.13 Further, there is no material before the Panel indicative of any initiative of A towards any clear website disclaimer as to attempt to diffuse or remove any potential confusion or to identify that A is a

qualified or unauthorised registrant only of the Disputed Domain Name (*AGDEST v Blogger Pty Ltd*, IAMA-3058 (2007)).

8.14 Further, using a confusingly similar domain name in a way which dilutes the value of a complainant's Trade Mark, or any of its Trade Marks, is likely to amount to bad faith, including in particular by reference to Paragraph 4b(ii) to (iv) of the Policy (*Universal Studios* – paragraph 7.35 above). This, in the view of the Panel, is such a presentation.

8.15 To the extent of these matters, the Panel has given the closest deliberation to the requisite elements of bad faith as exhibited within paragraph 4b of the Policy. It is reiterated that the paragraph 4b circumstances in paragraphs (i) to (iv) thereof are not exclusive, are illustrative only, but that one only of any of them can connote a reliable finding of bad faith. Other circumstances, other than those illustrated at Paragraph 4b, can equally do so.

8.16 In the Panel's view and determination, each of these considerations, and all such matters taken together, reliably establish that the registration by A of the Disputed Domain Name has been and become evidenced by registration and continuing use in bad faith.

8.17 For the reasons outlined, the Panel determines that G as Complainant has satisfied the requirements of Paragraph 4a(iii) of the auDRP Policy as to Disputed Domain Name registration in bad faith, and in particular, that the Respondent A has offended the non-exclusive examples of evidence of bad faith described in paragraphs 4b(ii), (iii) and (iv) of the Policy earlier described, and as the Complainant here urges.

9. **DECISION**

9.1 The Panel concludes for the reasons stated:

- (a) That the Disputed Domain Name is confusingly similar to a name, trade mark, or service mark in which the Complainant G has rights; and,

- (b) That the Respondent A has no rights or legitimate interests in the Disputed Domain Name; and,
- (c) That the Respondent A registered and used the Disputed Domain Name in bad faith; and that,
- (d) Complainant G complies with auDA's Policy, *Domain Name Eligibility and Allocation Policy Rules for the Open 2LDs (2008-05)*, in respect of the Disputed Domain Name.

9.2 For the reasons outlined, the Complainant has satisfied the elements of Paragraph 4a of the auDRP Policy.

10. RELIEF

10.1 The Panel orders that the Disputed Domain Name "goodmanfielderbaking.com.au" be transferred to Quality Bakers Australia Pty Ltd, namely to the Complainant 3.

10.2 The Panel notes that the Complainant G (including Quality Bakers Australia Pty Ltd) is eligible to hold the Disputed Domain Name under Schedule A, Paragraph 4a(i) of the auDA Policy as the owner of a 'name, trademark or service mark' in which the Complainant G (including Quality Bakers Australia Pty Ltd) has rights.

Dated this 28th day of July 2010

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JOHN A. McGRUTHER
SOLE PANELLIST

ANNEXURE 'A'

Procedural History [goodmanfielderbaking.com.auj [auDRP_1 0_14]

1. The complaint was submitted for decision in accordance with the (auDRP) Policy and Rules, which was approved by auDA in 2008-01 and commenced operation on 1 August 2002 and LEADR's Supplementary Rules (LEADR is the Provider).
2. The complete application was received from the Complainant by LEADR on **17/6/2010**.
3. On the **23/6/2010** LEADR sent the Respondent (**Andrew Goddard**) by **Email** a dispute notification letter and a copy of the complaint submitted.
4. A copy of the complaint submitted and the dispute notification letter sent to the Respondent were also posted to the registrar **NetRegistry** on **23/6/2010**.
5. The Registrar was also sent an email on **23/6/2010** requesting to lock the domain name in dispute.
6. LEADR advised auDA of the complaint on **15/04/2010** via e-mail.
7. On the **23/6/2010** LEADR sent a notification letter to the Complainant (**Goodman Fielder Limited, GF Brand Holding Company Pty Ltd and Quality Bakers Australia Pty Ltd**) by email along with a copy of the notification letter sent to the Respondent.
8. On the **6/7/2010** LEADR tried to contact the Respondent via phone and LEADR left a voice message regarding the response to be submitted. No call has been returned. The due date for the response to the complaint was confirmed to be 13/7/2010.
9. On **24/6/2010** the Registrar confirmed via email that the domain name in dispute has been locked.
10. No response has been submitted to this date.

11. On **16/7/2010** the provider approached the Panellist. The Panellist confirmed their availability, informed LEADR that they had no conflict issues with the parties and accepted the matter on **19/7/2010**.

12. The Panelist was informed on **19/7/2010** that the package was being sent for Adjudication